BRIEF IN SUPPORT OF PETITION.

ASSIGNMENT OF ERRORS.

The Appellate Court of Illinois, First District, erred:

In reversing the judgment of the Superior Court of Cook County;

In holding that there was no substantial evidence in the record supporting the verdict of the jury and the judgment of the trial court;

In holding that the evidence did not show that the death of Probert was caused, in whole or in part, by the negligence of respondent;

In holding that the evidence in the cause showed that the death of deceased was caused solely by his own negligence.

PROPOSITIONS OF LAW AND FACT RELIED ON.

In accordance with the decisions of this Court, petitioner was entitled to recover under the evidence in the cause.

Jenkins v. *Kurn*, 313 U. S. 256.
Seago v. *N. Y. C. RR. Co.*, 62 S. Ct. 806.
Southern Ry. Co. v. *Stewart*, 62 S. Ct. 617.
B. & O. Ry. Co. v. *Wilson*, 242 U. S. 295.

The burden of proof concerning contributory negligence of the deceased was on respondent.

Central Vermont R. Co. v. *White*, 238 U. S. 507, 512.

"Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."

Gunning v. *Cooley*, 281 U. S. 90, 94.

The decision of the question whether or not a verdict should have been directed in favor of the defendant, in a case based on the Federal Employers Liability Act, is a federal question for the decision of this Court.

Central Vermont Ry. v. *White*, 238 U. S. 507, 509.

If there is any substantial evidence in the record tending to prove that the death of Probert resulted, in whole or in part, from the negligence of respondent or his employees, or by reason of defects or insufficiency in the equipment or the track of the railroad, due to respondent's negligence, then the judgment of the Appellate Court reversing the judgment of the trial court, based on the verdict of a jury, without even giving petitioner an opportunity to try his case before another jury, is wrong.

U. S. Code, Title 45, Sec. 51.

In the circumstances of the instant case it was the proper and logical thing for Probert to do, to put the bad order car on the house track, and he was guilty of no negligence in so doing.

It would have taken much more work, time and trouble to have put the bad order car at the extreme north end of the passing track, than at the north end of the house track, which was only about one-fifth as long as the passing track, and it would have required much more labor, expense and trouble to have got the bad order car out of the passing track, than it would out of the short house

track, when the respondent came to take it to the shop or to a repair track to repair it.

Helton, the petitioner, who is a train dispatcher for the Milwaukee railroad, testified that where a bad order car was set out from a train at a place where there was a passing track holding 50 or 60 cars, and a house track that would hold approximately a dozen cars, the proper and practical place for "the bad order car would be on the house track. * * * Because it would not interfere with other trains using the passing track for passing trains" (Rec. 14-15).

If the bad order car had been put on the house track that would have disposed of the whole matter as far as this train was concerned, but with the car left on the passing track, at the end of a train of 34 cars, it would have produced confusion.

To have shoved the 34 cars in on the passing track with the bad order car on the end, and left it there, "It would create a hazard. It would leave the car practically in the center of the track and another train would have to have information with regard to that car; otherwise it would be a hazard" (Rec. 35-36, Helton's testimony).

Bad order cars are set out "wherever it is convenient for us" (Rec. 46). Evidence of Grogan, the conductor.

When a bad-order car is discovered in the train it is the duty of the crew to set that car out of the train (Rec. 28). And where the conductor and rear brakeman were left behind it would be the duty of the head brakeman (Probert) to take charge and give signals in the operation of the train (Rec. 33) and it would be good railroading to set the bad order car on the house track (Rec. 29, Evidence of Helton).

Olsen, the engineer of the train in question, a witness for his employer, testified: "This house track was just for spotting merchandise cars; setting out cars that were t.o be unloaded, or probably *they might put one or two cars in there like a bunk car or supply car or something like that.* The passing tracks east and west, *were used for trains to get in to let other trains pass*" (Rec. 53).

Grogan, the conductor of the train, testified in regard to "bad order cars not fit to be run on the road * * * we usually set them out wherever it is convenient for us * * * we put them any place wherever there is room for them" (Rec. 46).

Railroad companies recognize the fact that they cannot make rules that will cover all situations, and it becomes the duty of the man in charge of the train to use his or their own best judgment in those cases, each of them separately (Rec. 42). The man running a train, the head brakeman who has been made a conductor, all of those men running a train are supposed to be experienced, and to use their head in operating their train (Rec. 95). This last was testified to by Glasscock, the chief dispatcher of respondent. It is proper to set a bad order car out on some track where it would not interfere with main line operation until it can be taken to a repair point and this may be done without asking authority from the dispatcher (Rec. 113). The above is evidence given by Mr. Shavel, the dispatcher of respondent in charge at the time of this occurrence. Grogan, the conductor of the train in question, testified (Rec. 129). To set out this bad order car on the house track it would be necessary for them to back it in on the house track and cut it off, then pull from that track on to the main line. Then they would have to carry out the orders of the dispatcher with reference to the 33 cars they still had, by backing in on the passing track.

Clarence E. Larson, the chief train dispatcher of the Chicago, Milwaukee, St. P. & P. R. R., was called as an expert witness by respondent in the instant case. He was the first witness for respondent and apparently the one most relied upon by him as an expert.

Mr. Larson testified that if the conductor of a freight train should find a bad-order car, "supposing it is the 8th car from the rear," it would be the duty of the conductor to set it out. And in order to do that it would not be necessary for him to get in touch with any dispatcher.

He further testified: "Where a head brakeman being the only one of a crew besides the engineer and fireman, is attempting to put a string of thirty-four cars attached to the engine, backing in on a siding and on a passing siding, if he discovered a car at the rear of those cars that had no brakes, or the brakes were not working, it would be his duty to set that car out, and *it would not be improper, if there was a house track or storage track that was used for the purpose of setting cars that were to be left for some time, close by, to set the bad order car on that track*" (Rec. 73-74).

Not one of the many experts put on by respondent denied that this bad order car should have been set out, or denied that it was proper to set it out on the house track. All those witnesses were asked if it would be in accordance with proper railroading to put the *train* of 34 cars on the passing track instead of on the house track, but none testified that it would be improper to set out the *bad order car* on the house track.

The Appellate Court says (Rec. 180), "since this house track accommodated only 10 or 12 cars, Probert, who had been engaged as a brakeman on the road for some 16 years and was familiar with the track layout, must have known that it was dangerous to back a 34-car freight train

thereon." There is no evidence whatever in the record that justifies the assertion that Probert was attempting to put 34 cars on a track that would only hold 10 or 12. Such a suggestion is ridiculous. The Appellate Court in its whole opinion has proceeded on the erroneous inference that Probert was attempting to set this train of 34 cars on the house track which would only hold 10 or 12 cars. Then in applying the law to the facts as erroneously found that court has confused this case with a line of cases holding that a violation of some positive duty or rule by an employee was the *sole* cause of the injury there can be no recovry. As we shall show, this case is entirely different from any of those cases.

The error into which the Appellate Court has fallen in regard to the use of the house track is well illustrated by this excerpt from its opinion: "The evidence discloses that at least for ten years before this accident no cars on this track had rolled much beyond the freight house, and none as far as the improvised bumper at the dead end of this track" (Rec. 180).

The sole basis in the record for this statement, that we can find, is the evidence of Bubb, the station agent at Lake Bluff: "From my observation, only about one merchandise car at a time is set out there; that is what we call spotted at the freight house platform. Prior to this accident the end of the house track was about 150 feet north of the freight house platform. During that ten years I have had no experience with those merchandise cars, that were put in there to be spotted at the freight house, going beyond the freight house, rolling as they call it" (Rec. 123).

Of course, the merchandise cars *spotted for unloading* at the freight house would not go *beyond the freight*

house. But this evidence has no application to cars such as "a bunk car or supply car or something like that" (Rec. 53) when they were put on the house track, nor does it apply to any other car such as a bad order car, which was put on the track to be left for an indefinite time. The natural place for a bad order car would be at or near the north end of the track, where it would be out of the way.

As a matter of fact the house track extended 262 feet north of the freight house, instead of 150 feet as Bubb says, as is shown by the blueprint mentioned by the Appellate Court in its opinion (Rec. 175). It would be passing strange, if this great railroad system should maintain 262 feet of track for ten years in this busy commercial and industrial center, and never use it.

Probert did not violate the order of the train dispatcher, as the order did not include the disposition of a bad order car, and was not made with reference to, or in contemplation of, a bad order car.

The order reads: "To Engineer: You left your rear part of train at Waukegan. Set out part of train you now have on east passing track at Lake Bluff and return at Waukegan on westward track for balance of your train" (Rec. 66).

The whole case revolves around this written order. The Appellate Court of Illinois, in its opinion, several times says Probert disobeyed this order, and in doing so he was negligent and this negligence was the sole cause of his death (Rec. 182, 193). In making these statements the Appellate Court exhibits a grave misapprehension of the record.

The bad order condition of this car was entirely unknown to any member of the crew of the train excepting Grogan and Foley, who were at the rear of the train and remained in Waukegan until after Probert left the engine

with the intention of guiding the train into the passing track, in accordance with the message from the train dispatcher in Chicago, and Probert then discovered the serious, bad condition of this car.

Judge Nelson, the trial judge, seems to have been of the opinion that if the deceased discovered the car without brakes after he received the written message, that he would be justified in setting out the bad order car on the house track (Rec. 94). Evidence of Glasscock, chief train dispatcher of C. & N. W. Ry.

"The bad order car was not included in the message" (Rec. 105). Evidence of Dugan, chief train dispatcher of Wis. Div. C. & N. W.

Nobody knew about the bad order car except the train dispatcher and Arquilla, the leverman (Rec. 49-52). The message Arquilla got was for the head brakeman (Rec. 52).

It was *after* the train dispatcher at Chicago had dictated to the towerman the order, that the train dispatcher learned from a telephone call from Grogan, the conductor, that there was a bad order car in the train (Rec. 109).

Glasscock, chief train dispatcher for the Chicago and North Western Road, gave testimony on cross-examination very favorable to petitioner. Applying his testimony to the facts of the instant case he in effect admitted that if Probert did not know of the bad order car when he left the engine after reading the note from the train dispatcher, and that when he was at the back of the 34 cars, he discovered the bad order car, that he would be justified in using his own judgment as to what was to be done with the bad order car (Rec. 93-95).

The trial judge, who in the instant case, as was said by this Court in *So. Ry. Co.* v. *Stewart*, 62 S. Ct. 616, 618: "Alone of the judges in the several proceedings below had the opportunity to see and hear the witnesses," in commenting on the evidence, said: "Now his answer was that this order of the towerman, or the dispatcher by the towerman, affected only the entire thirty-four cars; nothing in the order about setting out any kind of a bad order car and he [the witness] said the proper track was to set it on the house track" (Rec. 30).

Rule 964 provides: "Cars must not be left on passing tracks without authority of chief train dispatcher" (Rec. 153). It would appear from this that Probert would not have any right to put the bad order car on the passing track and *leave it there*, where it might have remained for days, but he did have the right and discretion to put it in on the house track and leave it there until it was taken away to a shop or to a repair track for repairs.

Probert was directed to set out the train of 34 cars on the passing track during the few minutes it would take to go the 5 or 6 miles to Waukegan with the light engine, and come back and hook onto the 34 cars and proceed to Chicago. When he discovered the bad order car without working brakes, he was prohibited by rule 964 from putting the car on the passing track and *leaving it there*.

The conductor and rear brakeman were in Waukegan; Probert was on the ground 1300 feet or more from the engineer, and could communicate with him only by signals given by means of the fusee. He had no means of communicating with any train dispatcher. The responsibility of directing the movements of the train was his; it was the duty of the fireman to relay Probert's signals to the engineer and of the engineer to obey the signals; the dangerous car was there; Probert had to act on his own initia-

tive and act promptly; the means and the method were at hand, namely, to put the bad order car on the short house track, and leave it there. This he proceeded to do, and it would have been done with safety to all concerned, had the fireman and engineer cooperated with him and obeyed his signals.

The engineer and fireman were guilty of negligence in not obeying and carrying into effect, the signals of Probert, and this resulted in the car's running off the improperly protected end of the track, and overturning, and killing Probert.

The Appellate Court in its opinion (Rec. 180) admits that there is a dispute in the facts as to whether or not the engineer and fireman were negligent in not slowing down the train more "when Probert gave the slow *signal*". As a matter of fact there was a whole series of slow signals given by Probert, and not merely one. Christiansen, respondent's fireman, testified: "He [Probert] kept repeating that slow signal all the way in. He kept repeating the slow signal, moving his fusee slowly back and forth. I have no recollection as to how many times he did it" (Rec. 148).

Christiansen could have meant nothing else by the expression "all the way in", except all the way after the train had entered in the house track. So, it appears that Probert had kept repeating this slow signal, from the place the car he was riding on entered the house track until it reached the place where he gave the washout or violent signal to stop (Rec. 60). This was a distance of about 400 feet.

The use of the fusee is in itself a danger signal, that is, it is used on unusual occasions when it is difficult to see the ordinary signalman's lantern (Rec. 147).

For a distance of 400 feet Probert had been repeating this slow signal, which should have meant to the fireman and engineer, "have your engine under complete control, so that you can stop instantly, and within a few feet, when you get my signal to stop, which is likely to come any second now." The engineer, however, paid scant attention to the repeated warning he was receiving from Probert, and ran his engine in such a manner that when the signal to stop came, the engine ran on for two car lengths, or 80 feet, to the end of the track (Rec. 60) and for 75 feet beyond the end of the track (Rec. 116).

And according to the evidence of Olsen, the engineer, "As long as a brakeman or trainman was giving a slow signal, it would be my duty to keep slowing down slower" (Rec. 143).

This clearly made it a question of fact for the jury to determine whether or not this was negligence of the fireman and engineer, which in whole or in part caused Probert's death. But the Appellate Court says: "While there may be some dispute as to the facts on this phase of the case decisions under the Federal Employers' Liability Act, which are controlling in cases of this kind, are consistently to the effect that if the sole proximate cause of plaintiff's injury or death resulted from his own conduct, it bars recovery" (Rec. 180-1).

We earnestly contend that a careful and full inspection of this record will demonstrate the truth of the proposition that Probert was not guilty of *any* negligence or failure of duty on his part in seeking to set out the bad order car on the house track, and much less was he guilty of negligence that was the "sole and efficient cause of his death."

ARGUMENT.

Petitioner Has a Remedy in This Court.

In a case based on the Federal Employers Liability Act, when a plaintiff has had a verdict and a judgment thereon, in his favor, taken away from him by the decision of an intermediate court of review, on the alleged ground that there was not sufficient evidence in the record to sustain the verdict and judgment, that the plaintiff is not without remedy in this high Court, is shown by two very recent decisions of this Court. In both these cases this Court reversed the judgment of the intermediate Court of review, in one case the U. S. Circuit Court of Appeals for the Eighth Circuit, and in the other the Supreme Court of Missouri.

In the first of these cases, *Seago* v. *N. Y. C. R. R. Co.*, decided by this Court on February 2, 1942, this Court granted a Petition for writ of certiorari and at the same time filed the following opinion:

"Per Curiam. The petition for writ of certiorari is granted and the judgment is reversed on the ground that there was sufficient evidence of negligence for submission to the jury. The case is remanded to the Supreme Court of Missouri for its consideration of other questions presented on the appeal and for further proceedings not inconsistent with this opinion." (62 S. Ct. 806.)

The opinion in the *Seago* case of the Missouri Supreme Court is reported in 155 S. W. 2d. 126. The facts which this Court holds were sufficient to require the submission

of the case to the jury are quite similar to the facts in the instant case and as in the instant case, turned upon the question of the giving of a hand signal in the night time. Concerning this evidence as to the hand signal, the Supreme Court of Missouri says (p. 130):

"In the present case, submission on the theory that no hand lantern back up signal was given, would, we think, 'invite a verdict based on conjecture or speculation.' Since plaintiff failed to make a submissible case, errors, if any, in the instructions need not be considered." But because of this holding by the Missouri Supreme Court, this Court reversed the judgment of the Missouri Court.

In the second of these cases, *Southern Ry. Co.* v. *Stewart*, 62 S. Ct. 616, decided February 16, 1942, two opinions were filed. The majority opinion written by Mr. Justice Roberts, and the minority opinion written by Mr. Justice Black, three other justices joining. We feel at liberty to quote from either opinion in the *Stewart* case, as both opinions hold that the case was one for the jury to decide. The Circuit Court of Appeals for the Eighth Circuit reversed the judgment of the trial court, without remanding the cause for a new trial, just as the Appellate Court of Illinois did in the instant case, on the alleged ground that there was no evidence to sustain the verdict and judgment as to the negligence of the railroad (p. 617). This Court reversed the judgment of the Court of Appeals. The majority was of the opinion that the case should be retried by another jury, and it was so ordered, while the minority was of the opinion that the judgment of the Court of Appeals ought to be reversed, and the judgment of the trial Court affirmed. The latter opinion says at p. 618:

"The jury found from the evidence before it that the railroad had, contrary to the Federal Safety Appliance

Act, used cars 'not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.' 45 U. S. C., Sec. 2, 45 U. S. C. A., Sec. 2. The trial judge, who alone of the judges in the several proceedings below had the opportunity to see and hear the witnesses as well as to observe a coupling apparatus brought into the court room as an exhibit, made it clear that he regarded the evidence as sufficient to support the jury's verdict both by submitting the issues to it and by denying a new trial. The Circuit Court of Appeals took the same position in its first opinion. 8 Cir., 115 F. 2d 317. Solicitude for the right to trial by jury on issues of fact prompted the adoption of the Seventh Amendment as part of the Bill of Rights. Respect for the institution of trial by jury should, in my judgment, prompt us to leave undisturbed the jury's finding in this case that the coupler was defective.

"Because it must rely on the written page rather than living words, an appellate court can never fully appreciate the effect of testimony heard by a jury of local citizens. Even in the written record, however, I can find support for the jury's finding which convinces me that it should stand."

It appearing that the *Stewart* case had been settled, a petition for rehearing was granted, and the suit directed, by this Court, to be dismissed (62 S. Ct. 616).

Jenkins v. *Kurn*, 313 U. S. 256, decided May 5, 1941, is another recent decision of this Court in a case based on the Federal Employers Liability Act. In the *Jenkins* case the injured employee recovered a verdict of $12,000 in the state trial court. This judgment was reversed by the Supreme Court of Missouri and the case was not remanded for a new trial.

The case involved the giving of a signal of the injured man to the engineer of a locomotive. This Court held that the Supreme Court of Missouri was in error in reversing the judgment of the trial court, and this Court reversed the judgment of the Supreme Court of Missouri.

This Court says in its opinion (p. 258): "The single question is whether the trial court correctly refused to direct a verdict for respondents."

B. & O. R. R. Co. v. *Wilson,* 242 U. S. 295, is an opinion of this Court written by Mr. Justice Holmes in a Federal Employers' case, showing very definitely that where there is any substantial evidence upon which the jury has based a verdict, that the verdict of the jury will not be disturbed; that the verdict of the jury is binding upon this Court. The Court says at page 297:

"The first step in the Railroad's real defense was that the plaintiff was not kept on duty more than sixteen hours, a proposition that there was substantial evidence to maintain. *But that having been overthrown by the verdict,* it contends that the injury must happen during the violation of law. * * * In this case *there was evidence that whether technically on duty or not the plaintiff had been greatly overtaxed before the final strain of more than sixteen hours and that as a physical fact it was far from impossible that the fatigue should have been a cause proximately contributing to all that happened. If so, then by the Employers' Liabiltiy Act, Sections 3 and 4, questions of negligence and assumption of risk disappear.*" (Italics ours.)

The Appellate Court of Illinois in its opinion cites a number of cases as sustaining its decision in the instant case (Rec. 181-2). Three of these cases are effectually

disposed of as not having any application to such a case as we are now presenting to this Court in a decision of this Court, *Rocco* v. *Lehigh Valley R. Co.,* 288 U. S. 275, in which the opinion written by Mr. Justice Roberts says at page 278:

"The Court of Appeals held, as matter of law, that Rocco's negligence was the primary cause of the accident, and therefore the petitioner could not maintain the action. This ruling was made in reliance upon the authorities of which *Davis* v. *Kennedy,* 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212; *Unadilla Valley Ry. Co.* v. *Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224; and *Southern Ry. Co.* v. *Youngblood,* 286 U. S. 313, 52 S. Ct. 518, 76 L. Ed. 1124, are typical. These were cases where a member of a train crew was killed as a result of disregarding orders to wait at a given point until a train moving in the opposite direction had passed. In each of them the decedent's negligence was the proximate and efficient cause of the accident; in each it was sought to show that the fatality was in part due to alleged negligence of some other employee in omitting to give the decedent an order which would have reminded him of the orders previously given and by which he was bound. In none was there any negligence on the part of employees operating the train moving in the opposite direction, with which the collision took place. These decisions are not controlling in the present case."

None of the cases cited by the Appellate Court is any authority whatsoever for holding as this Court has done that Probert's death was caused by the sole negligence of himself. In fact neither of those cases is even persuasive because neither is analogous to the case at bar, by reason of the facts being entirely different. In each of those cases the injury or death was caused solely by the violation of some rule, statute or positive duty of the injured person.

CONCLUSION.

The last of the 34 cars in the train at Lake Bluff was a bad-order car. The bad-order car was discovered by the conductor at Waukegan, and it was during his attempt to set the bad-order car out at Waukegan that the train became separated. At Lake Bluff, Probert dropped off the head end of the train and waited until the train went past him and then discovered that the last car was a bad-order car and got on it for the purpose of setting it out on the house track. When the train had pulled south past the switch to the house track, he gave a signal for the train to stop. He then had to get off of the car and open the switch for the train to back into it so that the bad-order car could be left on the house track. He then climbed upon the bad-order car again and gave a signal which the fireman relayed to the engineer to back the train onto the house track. Not knowing about the bad-order car, the engineer apparently assumed that he was backing a 34-car train onto the passing track. Probert immediately started to give slow signals, as he knew that the house track was only long enough to hold about 12 or 13 cars. Each slow signal required the engineer to slow down the train, but the engineer believing that he had to travel a total distance of more than 34 car lengths, *disregarded the slow signals* and kept on going backwards. If he had obeyed the previous slow signals which Probert gave when he received the stop signal from Probert, the train could easily have been stopped and the bad-order car set out on the house track as Probert intended to set it out. The cause of the accident was the failure of the engineer to obey the slow signals given by Probert and relayed to the engineer by the fireman.

The Illinois Appellate Court (Rec. 182) erroneously concluded that Probert was trying to put 34 cars on the house track, which Probert knew only had room for 12 or 13 cars.

This assumption can only be based on the further assumption that Probert had suddenly become bereft of all reason. On the contrary, Probert was a sensible man and a railroad brakeman and conductor of 16 years' experience. He was familiar with the house track and knew that it had room for only about 12 or 13 cars. The only possible explanation of the movement as directed by him was *to set out the bad-order car on the house track.* This was not in violation of the order given by the dispatcher. It was simply an essential movement which Probert had to order, on his own initiative, before carrying out the order of the dispatcher. This Court, which has passed upon many cases brought under the Safety Appliance Act, well knows that one of the most essential duties of a railroad and its employees is to detect bad-order cars and as soon as possible put them in a position where they will not cause accidents and injuries. This was what Probert was trying to do, and would have done with safety to all persons concerned, had the engineer and fireman obeyed his slow signals, as it was their duty to do.

The further question may be asked as to why Probert was setting out the bad-order car on the house track, rather than on the passing track with the rest of the train. At the blind end of the little used house track the bad-order car would be out of the way and would not interfere with any other movements as the only entrance to the house track was from the south. The passing track was used more, was a much longer track, and the placing of the car on the passing track would have been a hazard, an obstacle to movements of other trains, and also

it would have been an obstacle in the further movement which this train would have had to have made after the trip to Waukegan and back. The primary use of the passing track, as its name implies, was for trains to be placed temporarily upon it while other trains were passing on one of the through tracks.

Respectfully submitted,

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